Suruhanjaya Pilihan Raya & Ors v Kerajaan Negeri Selangor and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS W-01(IM)-135–04 OF 2017 AND W-01(IM)-136–04 OF 2017
ZAWAWI SALLEH, ABDUL RAHMAN SEBLI AND KAMARDIN HASHIM JJCA
17 AUGUST 2017

Civil Procedure — Discovery — Relevancy of documents — Selangor State Government applied to High Court to compel Election Commission ('EC') to produce addresses and locality codes and locality names of 136,272 voters whose names appeared on electoral roll without their addresses — Application for discovery followed Selangor Government's judicial review application to quash EC's delimitation-of-constituencies exercise on ground absence of the voters' addresses rendered the exercise invalid — High Court allowed discovery of locality codes and locality names but dismissed prayer for discovery of the addresses — Whether Selangor Government's withdrawal of appeal against refusal to allow discovery of addresses undermined its case against EC and estopped it from further questioning validity of delimitation exercise on ground of 'missing addresses' — Whether issue of locality code and locality name never part of Selangor Government's pleaded case — Whether High Court should not have granted discovery of locality codes and locality names because they were irrelevant — Whether discovery should also not have been ordered because EC did not have possession of documents asked for — Whether High Court rightly dismissed Selangor Government's application to cross-examine EC's Chairman on his affidavit because that application similarly founded on the same issue of 'missing addresses'

The two appeals herein arose from a judicial review application ('the JR application') filed by the Selangor State Government ('the Selangor Government') to: (a) quash a notice published by the Election Commission ('EC') in the *gazette* to carry out a delimitation-of-constituencies exercise in the year 2016 in Peninsular Malaysia; and (b) compel the EC to publish a fresh notice to carry out a delimitation exercise which took into account 'the correct and updated addresses of 136,272 voters in the State of Selangor' whose addresses were missing from the electoral roll used in the 2016 delimitation exercise. The Selangor Government contended that without the addresses, the 2016 delimitation exercise was invalid, unconstitutional, unreasonable, irrational and unfair as it gave rise to the possibility that the constituencies of the 136,272 voters ('the said voters') had been changed or arbitrarily assigned. The Selangor Government submitted that the EC was obliged to disclose — from data obtained from the 2003 and 1994 delimitation exercises — whether the localities of the said voters had changed. This, it said, was imperative

because the EC had admitted that it had made mistakes in the past where the localities of some voters had been changed without their knowledge. In order to obtain further evidence to aid its case at the JR application hearing, the Selangor Government applied for discovery of ten matters and also applied to cross-examine the EC's Chairman (Datuk Seri Mohd Hashim bin Abdullah in the appeals herein) on his affidavit filed in the proceedings. Two of the ten matters in respect of which discovery was sought were the addresses of the said voters and their 'locality code and locality name' based on data obtained from the 2003 and 1994 delimitation exercises. The High Court allowed only the prayer for discovery of the locality code and locality name of the said voters. All the other prayers for discovery (including the one asking for the addresses of the said voters) as well as the application to cross-examine the EC's Chairman were dismissed. In the instant appeals, the EC and its Chairman and secretary appealed against the order granting discovery whilst the Selangor Government appealed against the dismissal of those reliefs it had asked for. At the start of the hearing of the appeals, the Selangor Government withdrew its appeal against the dismissal of its prayers for discovery. The EC submitted that the addresses of voters were not important and it was not required to have possession of them because the locality where a person was to vote was assigned immediately upon that person's registration as a voter based on the address shown on the identity card and once the localities were so assigned, they remained unchanged unless the voter applied to change his/her address.

Held, allowing the EC's appeal, dismissing the Selangor Government's appeal, setting aside the High Court's decision to allow discovery of the locality code and locality name of the said voters and affirming the decision to disallow the cross-examination of the EC's Chairman:

(1) The whole premise of the Selangor Government's pleaded case was the missing addresses of the 136,272 voters from the electoral roll. The contention was that without those addresses on the roll, it was not possible for the EC to have carried out the 2016 delimitation exercise. The judicial review application made no mention of the locality code and locality name of the 136,272 voters that the EC used in the 2003 and 1994 delimitation exercises. The non-availability of the locality code and locality name was clearly not a ground for impugning the 2016 delimitation exercise (see paras 12–14).

(2) The prayer asking for discovery of the addresses of the 136,272 voters was crucial and central to the judicial review application as it related to a matter that went to the root of the Selangor Government's case against the EC, namely, that it had acted unlawfully when it carried out the 2016 delimitation exercise by using an electoral roll that did not have the addresses of the said voters. By abandoning its appeal against the dismissal of that prayer, the question of the missing addresses became a non-issue as the Selangor Government was deemed to have accepted that

the addresses of the 136,272 voters were not necessary for the purposes of the substantive judicial review hearing; that discovery of the addresses was not necessary. This undermined the whole substratum of the Selangor Government's case. If the addresses of the 136,272 voters were not required for the purposes of the judicial review hearing, it could not be argued that they were necessary for the purposes of the 2016 delimitation exercise. The issue of the missing addresses became completely irrelevant as the fact that the addresses were not on the electoral roll could not now be used as a ground to say that the 2016 delimitation exercise was not carried out in accordance with the law (see paras 21–23, 25, 41, 44, 53 & 79).

(3) The High Court acted on a wrong principle in allowing the Selangor Government's application for discovery of the locality code and locality name that was used for the 2003 and 1994 delimitation exercises. The Selangor Government's pleaded case was never about the non-availability of the locality code and locality name of the voters or that the 2016 delimitation exercise was unlawful because the electoral roll did not contain the locality code and locality name of the 136,272 voters. Its case all along was about the missing addresses of the voters on the electoral roll. The application for discovery, therefore, was clearly not predicated on the issue involved, which was whether the missing addresses had tainted the 2016 delimitation exercise, given that the prayer for discovery of the addresses of the 136,272 voters had been withdrawn. To entitle the Selangor Government to an order for discovery of the locality code and locality name, it had to be shown that there were essentially or fundamentally important questions of fact that were in serious dispute. From the Selangor Government's perspective and pleaded case, the dispute was over the missing addresses of the said voters from the electoral roll. The missing addresses did not even qualify as a dispute, let alone a serious dispute on an essentially and fundamentally important question of fact that warranted discovery of the locality code and locality name. The addresses were not in the EC's possession and the Selangor Government itself confirmed that it did not need the addresses for the substantive hearing. It was therefore futile to argue that the locality code and locality name of the voters used during the previous delimitation exercises would have provided valuable information that might have proved or disproved either party's contentions at the substantive hearing. The locality code and locality name of the 136,272 voters that the EC used to carry out the 2003 and 1994 delimitation exercises was out of the EC's possession and it had not been shown that the EC was required by law to keep the locality code and locality name after the 136,272 voters had been assigned their localities at the point of registration. The law required that documents sought to be discovered must be in the other party's possession before an order for discovery could be made. Since the

locality code and locality name for the 2003 and 1994 delimitation exercises was not in the EC's possession, the order for discovery compelling the EC to furnish the locality code and locality name for the purposes of the substantive judicial review hearing should not have been made (see paras 68, 71–74, 76–78 & 98).

(4) The issue concerning the 2003 and 1994 locality code and locality name of the voters was one that was raised for the first time in the course of the exchange of affidavits between the parties and was not the ground on which the Selangor Government's case was based to challenge the legality of the 2016 delimitation exercise. The EC's explanation that it did not have the locality code for the 2003 and 1994 delimitation exercises was reasonable and consistent with reg 10 of the Elections (Registration of Electors) Regulations 2002 which required the electoral roll to be revised every three months. There was no reasonable ground for believing that there had been a breach of public duty on the part of the EC in failing to keep the locality code. It was unreasonable to expect the EC to keep an electoral roll and locality code that was used for delimitation exercises carried out decades ago (see paras 58 & 60–61).

(5) The principles applicable in the application to cross-examine the Chairman of the EC were the same as those there were applicable in an application for discovery. The High Court was right in disallowing the prayer for cross-examination as it was grounded on the missing addresses of the 136,272 voters, the same ground that was relied upon in applying for discovery of the locality code and locality name of the voters (see paras 83 & 94).

[Bahasa Malaysia summary

Dua rayuan ini berbangkit daripada permohonan semakan kehakiman ('permohonan SK') yang difailkan oleh Kerajaan Negeri Selangor ('Kerajaan Selangor') untuk membatalkan satu notis yang diterbitkan oleh Suruhanjaya Pilihanraya (SPR) dalam *warta* untuk: (a) melaksanakan pelaksanaan persempadanan kawasan pilihan raya pada tahun 2016 di Semenanjung Malaysia; dan (b) memaksa SPR untuk menerbitkan notis baru untuk melaksanakan pelaksanaan persempadanan yang mengambil kira 'the correct and updated addresses of 136,272 voters in the State of Selangor' yang alamatnya hilang dari daftar pemilih yang digunakan pada tahun 2016 untuk pelaksanaan persempadanan. Kerajaan Selangor menghujahkan tanpa alamat itu, persempadanan 2016 adalah tidah sah, tidak berpelembagaan, tidak munasabah, tidak wajar dan tidak adil kerana ia menimbulkan kemungkinan bahawa kawasan pilihan raya kepada 136,272 pengundi ('pengundi tersebut') telah diubah atau diberikan sewenang-wenangnya. Kerajaan Selangor mengemukakan bahawa SPR adalah bertanggungjawab untuk mendedahkan — daripada data yang diperolehi dari pelaksanaan persempadanan dari tahun 2003 dan 1994 — sama ada kawasan pengundi tersebut telah ditukar. Ini,

katanya, adalah penting kerana SPR telah mengaku bahawa ia telah membuat kesilapan pada masa lalu di mana kawasan beberapa pengundi telah diubah tanpa pengetahuan mereka. Untuk mendapatkan keterangan lanjut untuk membantu kesnya dalam pendengaran permohonan SK, Kerajaan Selangor memohon untuk penemuan sepuluh perkara dan juga memohon untuk memeriksa balas Pengerusi SPR (Datuk Seri Mohd Hashim bin Abdullah dalam rayuan ini) atas afidavitnya difailkan dalam prosiding. Dua dari sepuluh perkara itu berkaitan dengan penemuan dipohon adalah alamat pengundi tersebut dan 'locality code and locality name' mereka berdasarkan data yang diperolehi dari pelaksanaan persempadanan pada tahun 2003 dan 1994. Mahkamah Tinggi membenarkan hanya permohonan untuk penemuan kod kawasan dan nama kawasan pengundi tersebut. Kesemua permohonan lain untuk penemuan (termasuk permintaan alamat pengundi tersebut) dan juga permohonan untuk memeriksa balas Pengerusi SPR ditolak. Dalam rayuan ini, SPR dan Pengerusi serta setiausahanya merayu terhadap kebenaran perintah penemuan manakala Kerajaan Selangor merayu terhadap penolakan relif-relif yang telah dipohon. Pada awal pendengaran rayuan, Kerajaan Selangor menarik balik rayuannya terhadap penolakan permohonannya terhadap penemuan. SPR mengemukakan bahawa alamat pengundi adalah tidak penting dan ia tidak perlu untuk mempunyai milikan terhadap mereka kerana kawasan di mana seseorang untuk mengundi telah diberikan sebaik sahaja pendaftaran individu itu sebagai pengundi berdasarkan alamat yang tertera atas kad pengenalan dan sebaik sahaja kawasan diberikan, ia kekal tidak berubah melainkan pengundi memohon untuk mengubah alamat mereka.

Diputuskan, membenarkan rayuan SPR, menolak rayuan Kerajaan Selangor, mengetepikan keputusan Mahkamah Tinggi untuk membenarkan penemuan kod kawasan dan nama kawasan pengundi tersebut dan mengesahkan keputusan untuk tidak membenarkan pemeriksaan balas terhadap Pengerusi SPR:

(1) Keseluruhan kes yang diplidkan oleh Kerajaan Selangor adalah berdasarkan alamat 136,272 pengundi yang hilang dari daftar pilihan raya. Hujahannya adalah tanpa alamat pada daftar, adalah mustahil untuk SPR untuk menjalankan pelaksanaan persempadanan tahun 2016. Permohonan semakan kehakimah tidak menyatakan kod kawasan dan nama kawasan 136,272 pengundi yang digunakan oleh SPR pada tahun 2003 dan 1994 untuk pelaksanaan persempadanan. Ketiadaan kod kawasan dan nama kawasan jelaslah bukan alasan untuk mempersoalkan pelaksanaan persempadanan pada tahun 2016 (lihat perenggan 12–14).

(2) Permohonan untuk penemuan alamat 136,272 pengundi adalah penting dan utama terhadap permohonan semakan kehakiman kerana ia berkaitan dengan perkara pokok kes Kerajaan Selangor terhadap SPR, iaitu, ia telah bertindak bersalahan dengan undang-undang apabila ia

menjalankan pelaksanaan persempadanan tahun 2016 dengan menggunakan daftar pilihan raya yang tidak mempunyai alamat pengundi tersebut. Dengan meninggalkan rayuannya terhadap penolakan permohonan itu, persoalan kehilangan alamat tidak menjadi isu kerana Kerajaan Selangor dianggap telah menerima alamat 136,272 pengundi tidak perlu bagi tujuan pendengaran semakan kehakiman substantif; penemuan alamat adalah tidak perlu. Ini menjejaskan seluruh lapisan bawah kes Kerajaan Selangor itu. Jika alamat 136,272 adalah tidak diperlukan untuk tujuan pendengaran semakan kehakiman, ia tidak boleh mempertikaikan bahawa ia adalah perlu bagi tujuan pelaksanaan persempadanan tahun 2016. Isu kehilangan alamat menjadi sangat tidak relevan kerana alamat yang tidak ada pada daftar pilhan raya sekarang tidak boleh digunakan sebagai alasan untuk mengatakan pelaksanaan persempadanan tahun 2016 tidak dijalankan mengikut undang-undang (lihat perenggan 21–23, 25, 41, 44, 53 & 79).

(3) Mahkamah Tinggi bertindak atas prinsip yang salah dalam membenarkan permohonan Kerajaan Selangor untuk penemuan kod kawasan dan nama kawasan yang digunakan untuk pelaksanaan persempadanan tahun 2003 dan 1994. Kes yang diplidkan oleh Kerajaan Selangor bukanlah tentang ketiadaan kod kawasan dan nama kawasan pengundi atau pelaksanaan persempadanan tahun 2016 adalah bersalahan dengan undang-undang kerana daftar pilihan raya tidak mengandungi kod kawasan dan nama kawasan 136,277 pengundi. Ini adalah kes berkaitan dengan alamat pengundi yang hilang pada daftar pilihan raya. Permohonan untuk penemuan, oleh itu, ternyata tidak tertumpu kepada isu terbabit, iaitu sama ada alamat yang hilang telah mencemarkan pelaksanaan persempadanan tahun 2016, memandangkan bahawa permohonan untuk penemuan alamat 136,272 pengundi telah ditarik balik. Untuk memberi hak kepada Kerajaan Selangor kepada satu perintah untuk penemuan kod kawasan dan nama kawasan, ia perlu ditunjukkan bahawa ada persoalan penting atau asas yang penting yang serius dipertikaikan. Dari perspektif dan kes yang diplidkan oleh Kerajaan Selangor, pertikaian adalah terhadap alamat pengundi yang hilang dari daftar pilihan raya. Alamat yang hilang itu tidak boleh diterima sebagai pertikaian, apatah lagi pertikaian serius mengenai persoalan dasar dan dasar penting yang mewajarkan penemuan kod kawasan dan nama kawasan. Alamat tidak berada dalam milikan SPR dan Kerajaan Selangor sendiri mengesahkan bahawa ia tidak memerlukan alamat untuk pendengaran substantif. Oleh itu, ia adalah sia-sia untuk mempertikaikan bahawa kod kawasan dan nama kawasan pengundi yang digunakan sewaktu pelaksanaan persempadanan sebelum ini akan memperuntukkan maklumat penting yang mungkin membuktikan atau menyangkal hujahan kedua-dua pihak pada pendengaran substantif. Kod kawasan dan nama kawasan 136,272

pengundi yang digunakan oleh SPR untuk menjalankan pelaksanaan persempadanan tahun 2003 dan 1994 tidak berada dalam milikan SPR dan ia tidak menunjukkan bahawa SPR dikehendaki oleh undang-undang untuk menyimpan kod kawasan dan nama kawasan setelah 136,272 pengundi telah diberikan kawasan mereka setelah mendaftar. Undang-undang mengkehendaki bahawa dokumen yang dipohon untuk penemuan hendaklah berada dalam milikan pihak lain sebelum satu perintah penemuan boleh dibuat. Memandangkan kod kawasan dan nama kawasan untuk pelaksanaan persempadanan tahun 2003 dan 1994 tidak berada dalam milikan SPR, perintah untuk penemuan yang memaksa SPR untuk mengemukakan kod kawasan dan nama kawasan bagi tujuan pendengaran semakan kehakiman substantif tidak sepatutnya dibuat (lihat perenggan 68, 71–74, 76–78 & 98).

(4) Isu berkaitan kod kawasan dan nama kawasan pengundi tahun 2003 dan 1994 adalah satu yang dibangkitkan untuk pertama kali dalam kausa pertukaran afidavit antara pihak-pihak dan bukanlah alasan di mana kes Kerajaan Selangor adalah berasaskan untuk mencabar kesahihan pelaksanaan persempadanan 2016. Penjelasan SPR bahawa ia tidak mempunyai kod kawasan untuk pelaksanaan persempadanan tahun 2003 dan 1994 adalah munasabah dan konsisten dengan peraturan 10 Peraturan Pilihan Raya (Pendaftaran Pengundi) 2002 yang mengkehendaki daftar pilihan raya disemak setiap tiga bulan. Tiada alasan munasabah untuk mempercayai bahawa terdapat pelanggaran kewajipan awam pada pihak SPR kerana gagal menyimpan kod kawasan. Ia adalah tidak munasabah untuk menjangkakan SPR menyimpan daftar pilihan raya dan kod kawasan yang digunakan untuk pelaksanaan persempadanan yang dijalankan beberapa dekad yang lalu (lihat perengan 58 & 60–61).

(5) Prinsip terpakai dalam permohonan untuk memeriksa balas Pengerusi SPR adalah sama seperti yang terpakai dalam permohonan untuk penemuan. Mahkamah Tinggi adalah betul dalam tidak membenarkan permohonan untuk pemeriksaan balas kerana ia berdasarkan alamat 136,272 pengundi yang hilang, alasan yang sama yang diandalkan untuk memohon penemuan kod kawasan dan nama kawasan pengundi (lihat perenggan 83 & 94).]

Notes

For cases on relevancy of documents, see 2(2) *Mallal's Digest* (5th Ed, 2015) paras 3521–3529.

Cases referred to

ECM Libra Investment Bank Bhd v Foo Ai Meng & Ors [2013] 3 MLJ 35, CA (refd)

A *Kerajaan Negeri Kelantan v Petroliam Nasional Bhd and other appeals* [2014] 6 MLJ 31, FC (refd)
Nguang Chan aka Nguang Chan Liquor Trader & Ors v Hai-O Enterprise Bhd & Ors [2009] 5 MLJ 40, CA (refd)
O'Reily and others v Mackman and others [1983] 2 AC 237, HL (refd)
B *Paruvathy a/p Palany v Sathiasealan a/l Govindasamy* [1999] 5 MLJ 151, HC (refd)
R (on the application of Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs [2002] EWCA Civ 1409, CA (refd)
Ratnam v Cumarasamy & Anor [1965] 1 MLJ 228; [1964] 1 LNS 237, PC
C (refd)
Rekapacific Bhd v Securities Commission & Anor and other appeals [2005] 2 MLJ 269, CA (refd)
Tetuan Kumar Jaspal Quah & Aishah (suing as a firm) v The Co-Operative Central Bank Ltd [2007] 4 MLJ 638, CA (refd)
D *Tun Dr Mahathir bin Mohamad & Ors v Datuk Seri Mohd Najib bin Tun Hj Abdul Razak* [2016] 11 MLJ 1, HC (refd)
Yekambaran s/o Marimuthu v Malayawata Steel Bhd [1993] MLJU 96; [1994] 2 CLJ 581, HC (refd)

E **Legislation referred to**

Elections (Registration of Electors) Regulations 2002 reg 10
Federal Constitution art 119, Thirteenth Schedule, s 4
Rules of Court 2012 O 24, O24 rr 12, 13, O 53, O 53 rr 3(2), 6

F *Amarjeet Singh a/l Serjit Singh (Alice Loke Yee Ching, Azizan bin Md Arshad, Nik Azrin Zairin bt Nik Abdullah and Shaiful Nizam bin Shahrin with him) (Senior Federal Counsel, Attorney General's Chambers) for the Election Commission.*
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G *Adli with her) (Daim & Gamany) for the Selangor Government.*
Andrew Khoo Chin Hock watching brief for the Bar Council.

Abdul Rahman Sebli JCA (delivering judgment of the court):

H INTRODUCTION

[1] There were two appeals before us involving the same parties. The first appeal was by the Election Commission (the first appellant) and its Chairman (the second appellant) and Secretary (the third appellant) against the following
I order made by the High Court:

> Responden-Responden akan dalam masa 14 hari selepas penyampaian servis kepadanya Perintah ini untuk menzahirkan kod dan nama lokaliti dalam format 'data base format of Microsoft Access' untuk 136,272 pengundi-pengundi yang dirujuk dalam perenggan 58 dan Ekshibit MAA-12 Afidavit Sokongan Pemohon

yang diikrarkan oleh Mohamed Azmin bin Ali pada 18 Oktober 2016 (dibaca bersama Appendix 1 yang disimpan dalam cakera padat yang diberikan kepada parti-parti pada 16 Disember 2016) buat 2 latihan kajian semula persempadanan untuk Negeri-Negeri Tanah Melayu yang lepas iaitu 2003 dan 1994.

[2] It was an order to furnish the locality code and locality name of the 136,272 voters for the State of Selangor which the Election Commission used during the 2003 and 1994 delimitation exercises.

[3] The second appeal was by the Government of the State of Selangor against the decision of the same court dismissing its application to cross-examine the Chairman of the Election Commission.

[4] For convenience, we shall refer to the appellants in the first appeal collectively as 'the Election Commission' and the appellant in the second appeal as 'the Selangor Government'.

[5] Having heard arguments by both sides, both written and oral, we unanimously allowed the Election Commission's appeal and dismissed the Selangor Government's appeal. We set aside the decision of the High Court allowing discovery of the locality code and locality name of the 136,272 voters and affirmed the decision to disallow cross examination of the Election Commission Chairman. No order for costs was made in respect of both appeals. We now provide the grounds for our decision.

FACTS OF THE CASE

[6] The facts are these. On 15 September 2016, the Election Commission published a notice under s 4 of the Thirteenth Schedule to the Federal Constitution ('the Thirteenth Schedule notice') which set in motion the delimitation of constituencies in the States of Malaya as reviewed by the Election Commission in 2016.

[7] On 18 October 2016, the Selangor Government filed an application for judicial review in the High Court at Kuala Lumpur praying, inter alia, for the following reliefs:

(a) an order of certiorari to quash the Thirteenth Schedule notice published by the Election Commission; and

(b) an order of mandamus to compel the Election Commission to publish a new Thirteenth Schedule notice and new proposed recommendations which comply, inter alia, with the Thirteenth Schedule to the Federal

A Constitution and to take into account the correct and updated addresses of the 136,272 voters in the State of Selangor where no addresses are stated.

B **[8]** The basis on which the above reliefs were sought was that the Election Commission acted contrary to law, unconstitutionally, unreasonably and irrationally when it carried out the 2016 delimitation exercise by using an electoral roll that was defective in that it did not contain the addresses of approximately 136,272 Selangor voters. This was expressed in ground 7.3 of the statement pursuant to O 53 r 3(2) of the Rules of Court 2012 ('the Rules') ('the O 53 statement') under the heading 'GROUNDS', which reads:

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> 7.3 used the electoral roll which is defective as approximately 136,272 voters in the State of Selangor shown on the electoral roll *do not have their corresponding addresses entered on the roll.* (Emphasis added.)

D **[9]** In her written submissions before us, learned counsel for the Selangor Government summarised the above ground 7.3 as follows:

> 22. Before we proceed, it is pertinent to summarise Ground 3 of the Applicant's judicial review application:
>
> E (i) the Election Commission does not possess *the addresses* of at least 136,272 voters in the State of Selangor;
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> (ii) without *the addresses,* it is open for the Election Commission to arbitrarily assign, maintain or change constituencies of these 136,272 voters in the State of Selangor;
>
> F (iii) such arbitrary assignment, maintenance or changing of constituencies for these 136,272 voters *without addresses* is tainted with illegality and cannot be used as a basis for the delimitation in the State of Selangor. (Emphasis added.)

G **[10]** Grounds (ii) and (iii) reflect the Selangor Government's suspicion that the Election Commission had not acted honestly in carrying out the 2016 delimitation exercise. Learned counsel stressed the point when she submitted at para 24:

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> 24. We submit that the correctness of the electoral roll is not an issue in this case — *the heart of the matter is whether the EC could carry out the 2016 Delimitation Exercise when (i) the addresses of up to 136,272 voters in the State of Selangor were missing* and/or unknown and/or (ii) there is a real possibility that the localities of these 136,272 voters in the State of Selangor have been incorrectly assigned. (Emphasis added.)

I **[11]** Paragraph 17 read with paras 18 and 19 of the Selangor Government's affidavit in support affirmed by Mohamed Azmin bin Ali on 13 January 2017 also emphasised on the missing addresses of the 136,272 voters when the

Menteri Besar averred:

> 17. I have been advised and verily believe that as a body which collects and compiles voter information, and has conducted both delimitation exercises in 2003 and 1994, the Election Commission is in possession, custody or power of the Locality of 136,271 Voters for the Last 2 Delimitation Exercises.
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> 18. It is thus imperative and in the interests of justice for this Honourable Court to know whether the localities of these 136,272 voters have changed in the last 2 delimitation exercises to make a determination on whether localities are indeed permanent and would not be changed (as alleged by the Respondents) or have been arbitrarily changed (as alleged by the Applicant).
>
> 19. Such finding would have a direct bearing on Ground 3 in this Application, whereby the issue is whether *the Election Commission has used a flawed electoral roll with missing addresses* (and consequently would result in and cause the arbitrary assignment of voters into localities, polling districts and constituencies) in the State of Selangor for the delimitation process. (Emphasis added.)

PREMISE OF THE SELANGOR GOVERNMENT'S CASE

[12] It is clear beyond peradventure that the whole premise of the Selangor Government's pleaded case against the Election Commission is the missing addresses of the 136,272 voters from the electoral roll. It is the veracity of the electoral roll that the Selangor Government is challenging.

[13] The contention was that without the voters' addresses on the electoral roll, it was not possible for the Election Commission to carry out the 2016 delimitation exercise. This is the substratum of the Selangor Government's case against the Election Commission. This is the dispute that it wants the High Court to resolve at the substantive judicial review hearing. Its case must rest or fall on this pleaded ground.

[14] What is pertinent to note with regard to ground 7.3 of the O 53 statement is that it makes no mention of the locality code and locality name of the 136,272 voters that the Election Commission used in carrying out the 2003 and 1994 delimitation exercises. The non-availability of the locality code and locality name is clearly not a ground for impugning the 2016 delimitation exercise.

[15] Ground 8 of the O 53 statement sums up the Selangor Government's grievance over the publication of the Thirteenth Schedule notice, in the following words:

> 8. Given all the evidence, facts and circumstances of the case, the Election Commission has issued the Notice and the Proposed Recommendations

unconstitutionally, unreasonably, irrationally and unfairly. Any other Election Commission similarly circumstanced would not have issued the Notice and the Proposed Recommendations.

[16] The application for leave was not opposed by the Election Commission and was duly granted by the Kuala Lumpur High Court on 16 December 2016.

DISCOVERY AND CROSS-EXAMINATION

[17] Having obtained leave and before the substantive judicial review application was heard by the High Court, the Selangor Government vide notice of application dated 13 January 2017 applied for the following prayers for discovery:

1(A)(i) the addresses in database format of Microsoft Access of the 136,272 voters referred to in paragraph 58 and Exhibit MAA-12 of the Applicant's Affidavit in Support affirmed by Mohamed Azmin bin Ali on 18.10.2016 (read together with Appendix 1 stored in a compact disc which was handed to parties on 16.12.2016);

1(A)(ii) the voter registration documentation for all the 136,272 voters referred to in paragraph 58 and Exhibit MAA-12 of the Applicant's Affidavit in Support affirmed by Mohamed Azmin bin Ali on 18.10.2016 (read together with Appendix 1 stored in a compact disc which was handed to parties on 16.12.2016), such as the Borang A referred to in Exhibit TF-1 of the Affidavit in Reply of Thomas Fann affirmed on 6.1.2017;

1(A)(iii) the *locality code and locality name* and database format of Microsoft Access of the 136,272 voters referred to in paragraph 58 and Exhibit MAA-12 of the Applicant's Affidavit in Support affirmed by Mohamed Azmin bin Ali on 18.10.2016 (read together with Appendix 1 stored on a compact disc which was handed to parties on 16.12.2016) for the last 2 delimitation exercises for the States of Malaya i.e. 2003 and 1994;

1(B) all reports, minutes and documentation on the steps taken by the Election Commission to implement the recommendations and/or address the issues raised in the 2012 PSC Report, particularly Recommendations 10.5 to 10.7 and 11.1 to 11.3 as found in Exhibit MAA-14 of the Applicant's Affidavit in Support affirmed by Mohamed Azmin bin Ali on 18.10.2016 (at pages 476-477);

1(C) the auditing trail of all voters in the State of Selangor in database format of Microsoft Access which would reflect all changes to voter information to date since registration to become a voter, including the reasons for any such change and when such change had occurred; and

1(D) a computer software application built by the Election Commission named the Electoral Geographical Information system used in the delimitation exercise for the State of Selangor. (Emphasis added.)

[18] In the same notice of application, the Selangor Government also applied to cross-examine the Chairman of the Election Commission on the affidavit that he filed in opposing the application for judicial review, in terms of the following prayers:

> (2) Further and/or in the alternatively, for the purpose above, that the Applicant be at liberty to cross-examine the 2nd Respondent upon the affidavit sworn by him and filed on 27.12.2016 by the Respondents for the purpose of being used as evidence at the hearing of the Applicant's judicial review application herein;
>
> (3) That such cross-examination may be taken at the hearing of the Applicant's judicial review application herein;
>
> (4) That the 2nd Respondent be ordered to attend to be cross-examined accordingly.

THE HIGH COURT'S DECISION

[19] The High Court delivered its decision on 21 April 2016. The learned judge only allowed prayer 1A(iii) ie discovery of the locality code and locality name of the 136,272 voters for the last two delimitation exercises, ie the delimitation exercises carried out in 2003 and 1994. The rest of the prayers, including the prayers for discovery of the addresses of the 136,272 Selangor voters and for cross-examination of the Election Commission Chairman were disallowed. Hence, the respective appeals by the Election Commission and the Selangor Government.

WITHDRAWAL OF PRAYERS AND ITS EFFECT

[20] At the commencement of the hearing of these appeals on 20 July 2017, learned counsel for the Selangor Government informed us that the Selangor Government did not wish to proceed with its appeal against the dismissal of prayers 1A(i), 1A(ii), 1B, 1C and 1D but only wished to defend the learned judge's decision in respect of prayer 1A(iii) which was granted in its favour, and to pursue its appeal against the decision to disallow cross-examination of the Election Commission Chairman.

[21] Prayer 1A(i), it will be recalled, was the prayer asking for discovery of the addresses of the 136,272 voters. This prayer was crucial and central to the application for judicial review as it relates to a matter that goes to the root of the Selangor Government's case against the Election Commission, namely that the Election Commission acted unlawfully when it carried out the 2016 delimitation exercise by using an electoral roll that did not have the addresses of the 136,272 voters, as pleaded in ground 7.3 of the O 53 statement (para 8 above).

[22] By abandoning its appeal in respect of prayer 1A(i), the Selangor Government must now be taken to accept that the addresses of the 136,272 voters are not necessary for the purposes of the substantive judicial review hearing. In other words, discovery of the addresses is not necessary.

[23] If the addresses of the 136,272 voters are not required for purposes of the judicial review hearing, we do not see how it can be argued at the same hearing that they were necessary for purposes of the 2016 delimitation exercise. Thus, even if the High Court were to grant the order of mandamus to compel the Election Commission to publish a new Thirteenth Schedule notice and new proposed recommendations, it will not include an order to take into account the correct and updated addresses of the 136,272 voters.

[24] If at all, the Election Commission will only be required to publish a new Thirteenth Schedule notice and new proposed recommendations, but minus the addresses of the 136,272 voters.

[25] In our opinion, the admission by the Selangor Government that the addresses of the 136,272 voters were not necessary for the 2016 delimitation exercise undermines the whole substratum of its case (as pleaded in ground 7.3) that the 2016 delimitation exercise was unlawful for the reason that it was carried out using an electoral roll that did not contain the addresses of the 136,272 voters. It leaves ground 7.3 of the O 53 statement without any leg to stand on.

THE ISSUES AND OUR DETERMINATION

[26] Given the stand now taken by the Selangor Government, there were only two issues left for our determination, namely:

(1) whether the High Court was right in allowing prayer 1A(iii); and

(2) whether the High Court was right in disallowing the cross-examination of the Chairman of the Election Commission.

[27] We shall deal with issue (1) first. The locality code and locality name referred to in prayer 1A(iii) is the locality code and locality name of the 136,272 voters that the Election Commission used to carry out the last two delimitation exercises for the States of Malaya, ie the exercises carried out in 2003 and 1994; events that took place 14 years and 23 years ago respectively, with a gap of nine years in between the two exercises.

[28] A locality is a sub-unit of a polling district. Several polling districts then form a State Constituency. Several State Constituencies in turn form a Parliamentary Constituency. In the document titled 'Portal Rasmi

Suruhanjaya Pilihan Raya Malaysia' handed to us by learned counsel for the Selangor Government during the course of argument, the following information is given with respect to a locality:

> *LOKALITI*
>
> Lokaliti adalah komponen paling kecil yang terdapat dalam Bahagian Pilihan Raya. Ia merupakan tempat tinggal sekumpulan orang tempatan yang mempunyai talian sosial yang jelas seperti kampong atau taman perumahan. Dalam urusan pendaftaran pemilih, *lokaliti adalah asas bagi menentukan di mana seorang pemilih akan mengundi. Penentuan tersebut adalah berdasarkan alamat yang dinyatakan dalam kad pengenalan.* (Emphasis added.)

[29] A locality is therefore the basis for the Election Commission to determine the location where the elector is to cast his vote. To determine the locality of a voter, the Election Commission relies on his address at the point of registration, which it obtains from the voter's identity card. According to the Election Commission, the addresses are not important and need not be in its possession because:

(i) voters have been accurately assigned their corresponding locality at the point of registration based on the addresses shown on their identity cards;

(ii) it is the locality of the voters which is the reference point for the Election Commission to assign, maintain and change constituencies of such voters; and

(iii) the localities of voters will not be changed, unless there is a change of address upon application made by the voters themselves.

[30] What this means is that once a voter has been assigned a locality at the point of registration, it is not necessary for the Election Commission to keep his address. The Selangor Government does not seriously dispute the Election Commission's averment that the addresses are not important. What it disputes is the Election Commission's explanation in (i), (ii) and (iii) above.

[31] First, explanation (i) and (ii). According to learned counsel, this is not borne out in some cases and in fact admitted by the Election Commission upon being queried on the change of localities of a sample of three voters in the State of Selangor. We were referred to para 16 of the Election Commission's affidavit in reply No 2 where the deponent affirmed:

> Saya nyatakan bahawa lokaliti telah diubah menurut peraturan 25(3) Peraturan-Peraturan Pilihan Raya (Pendaftaran Pemilih) 2002 kerana kesilapan pendaftaran menyebabkan ketiga-tiga orang diambil sebagai contoh didaftarkan di kawasan yang bukan kawasan pendaftarannya di atas permohonan pemilih tersebut.

[32] As for explanation (iii), it was pointed out that this is not accurate as evidenced by:

(a) the change of localities of 23 voters in the Parliamentary Constituency of Klang (P110) due to vague reasons such as 'dikeluarkan kerana silap pendataan' and 'pembetulan lokaliti';

(b) the change of localities of 180 voters were removed from the Parliamentary Constituency of Klang (P110) and 177 voters who were transferred to Kapar; and

(c) several other examples of voters in the State of Selangor whose localities have been changed without any change of addresses and application made by the voters themselves.

[33] The Selangor Government's 'dispute' is therefore over the question whether the voters' localities had been accurately determined by the Election Commission. It was submitted that there is thus a material dispute of fact between the Selangor Government and the Election Commission that requires disclosure of the locality code and locality name of the 136,272 voters that the Election Commission used in carrying out the 2003 and 1994 delimitation exercises.

[34] The question to ask in relation to this dispute vis a vis prayer 1A(iii) of the discovery application is whether the issues raised by learned counsel, in particular the mistakes that the Election Commission admitted to have made with regard to the change of localities of some of the voters, constitute serious disputes of fact that necessitated discovery of the locality code and locality name of the 136,272 voters that the Election Commission used in carrying out the 2003 and 1994 delimitation exercises.

[35] It was submitted that they constitute material disputes of fact between the Selangor Government and the Election Commission and that the only way to resolve the disputes was by discovery of the locality code and locality name of the 136,272 voters used during the 2003 and 1994 delimitation exercises.

[36] We were told that if the locality code and locality name of the 136,272 voters for the 2003 and 1994 delimitation exercises are presented before the court at the substantive hearing, the Selangor Government would be able to observe the change of localities of these voters from 1994 up to the present date to ascertain if there is any unusual pattern, which can be evidence of arbitrary and unlawful assignment of constituencies, thus tainting the 2016 delimitation exercise.

[37] We were also told that the localities of these voters from 1994 to date can also be cross-checked for their accuracy with the record of these voters kept at the National Registration Department, past electoral rolls and other sources. It was submitted that if the localities of this huge group of voters in the State of Selangor are shown to be incorrectly assigned, this would similarly taint the entire 2016 delimitation exercise.

[38] It was submitted that the learned judge had correctly appreciated the relevance and importance of the locality code and locality name of the 136,272 voters for the last two delimitation exercises when His Lordship said:

> [41] In my view, the locality codes for the *addressless voters* in the two previous redelimitation exercises would be valuable information that may prove or disprove either party's contentions. For example, if the information on the locality of the addressless voters establishes that the localities have been correctly recorded by reference to the current records for that voter at the National Registration Department, then it could not be said that the redelimitation exercise was flawed by reason of *reliance on an electoral roll that did not contain the addresses of the 136,272 voters.*
>
> [42] Of course, the mere fact that a voter's locality does not match his or her current address does not necessarily mean that the electoral roll is flawed, for the residency of a voter in the electoral roll is only changed if the voter makes an application to change his constituency. Nonetheless, if the locality code can be shown to have somehow been incorrectly recorded — whether by reason of the division of locality over time or otherwise — then the applicant's case for review is made stronger.
>
> [43] I was therefore of the view that the discovery of the locality codes was necessary for the fair disposal of the substantive application. (Emphasis added.)

[39] Learned counsel further submitted that the learned judge rightfully took into account the constitutional importance of the judicial review application when he took an expansive view of the documents:

> [46] What is relevant and necessary for the fair disposal for the substantive application is to be ascertained from the surrounding circumstances of the case, including the nature of the proceedings: see para 30, ante. In my view, if the challenge relates to a fundamental and constitutionally-guaranteed right, such as the right to vote, or the right to free and fair elections, the court would be entitled to take an expansive view of the documents would be necessary for the fair disposal of the challenge. This is an embodiment of the principle that the intensity of review in a public law case will depend on the subject matter at hand (per Laws LJ in *R v Secretary of State for the Home Department ex p Mahmood*). In the words of Lord Steyn, in law context is everything.

[40] The first thing to note with regard to the learned judge's description of the 136,272 voters as being 'addressless' is that it is factually wrong, and we say this with all due respect to the learned judge. The truth, as explained by the Election Commission, is that at the point of registration, the addresses of these

136,272 voters actually existed and were in fact taken from their identity cards, but once their localities were assigned, the Election Commission did not keep them as it was not necessary to do so.

[41] As we have alluded to earlier, with the withdrawal of prayer 1A(i), the Selangor Government is deemed to accept that it is unnecessary for the Election Commission to furnish the addresses of the 136,272 voters. Further, the Election Commission has explained that the localities of the voters will not be changed, unless there are changes of address upon application made by the voters themselves.

[42] Most importantly, there is no evidence that any of the 136,272 voters had applied to change their localities. Therefore, the Selangor Government's assertion that 'there is a real possibility that the localities of these 136,272 voters in the State of Selangor have been incorrectly assigned' (see para 10 above) is baseless.

[43] At para 41 of the grounds of judgment, the learned judge made references to the addresses of the 136,272 voters. It is obvious that the address factor weighed heavily in His Lordship's mind. This is perfectly understandable as the learned judge was considering whether to grant prayer 1A(i), ie discovery of the addresses.

[44] But with the withdrawal of prayer 1A(i) by the Selangor Government in these appeals, the issue of the missing addresses has become completely irrelevant. In our view, the effect of the withdrawal is to knock out Selangor Government's pleaded case that the Election Commission acted contrary to law, unconstitutionally, unreasonably and irrationally when it carried out the 2016 delimitation exercise by using a defective electoral roll that did not contain the addresses of the 136,272 voters. This has to be so because the whole basis of the Selangor Government's case against the Election Commission rests on the missing addresses, as pleaded in ground 7.3 of the O 53 statement.

INCONSISTENCY OF THE RESPONDENT'S POSITION

[45] However, in spite of the abandonment of prayer 1A(i), learned counsel persisted in her argument that it was necessary for the Election Commission to have the addresses of the 136,272 voters to carry out the 2016 delimitation exercise. At one point in her argument, learned counsel candidly told us that the Selangor Government does not need the addresses, but this is inconsistent with the main thrust of her argument, as can be seen from the following submissions before us:

> We say *you need the addresses to delimit.* Refer to Jilid 2(a) page 233. *They could not have done the delimitation exercise without the addresses.* Refer to Article 119 of the

Constitution — Tab 1 orange bundle. The right to vote is tied to your address. That is the document that they have destroyed. Refer to Jilid 2(a) page 99. Judge asked the question.

We want to see whether the locality code has changed. Refer to the judge's order — Bahagian A Jilid 1 page 16. Order No 1. We are not asking for the addresses. We only ask for the code for 2003 and 1994 for the 136,272 voters.

[46] In fact, it was strenuously argued that if the Election Commission were to deal only with locality and not the addresses, it would be relying on vague information which, according to learned counsel, would place the Selangor Government in the unenviable position of not knowing where exactly the 136,272 voters live.

[47] Clearly, the focus of the argument was still on the missing addresses of the 136,272 voters, which was exactly how the case was presented in the High Court, as can be seen from learned counsel's submissions at p 106 *Jld* 2A of the appeal record:

No 2 My Lord, we are actually questioning the delimitation exercise. *What we are saying is, they ought to base their delimitation exercise on the addresses. Not on the locality that you assigned ages ago and which may have changed and where we have shown there are errors. That's the point we are making here.* That ... it is vital that you do that because as I've shown My Lord, when the population grows, localities can change. *Addresses remain the same but you then know where to place them. So that's why we say it is critical.* So here My Lord, they are saying that you can't question the roll. No 1, I disagree with that. But in any event My Lord, what we are saying here is you based your delimitation exercise on the wrong basis. *That without addresses you cannot do this delimitation exercise.* (Emphasis added.)

[48] The third sentence above clearly suggests that the localities assigned to the 136,272 voters which the Election Commission used for the 2003 and 1994 delimitation exercises were not needed for the 2016 exercise. To drive home the point that the right to vote is tied to the addresses of the voters, we were referred to art 119 of the Federal Constitution.

[49] But this position has been overtaken by events and is history with the withdrawal of prayer 1A(i). It is therefore not open to the Selangor Government to now resurrect the issue of missing addresses. The position is no longer tenable. The Selangor Government's position after the withdrawal of prayer 1A(i) is the same as if it had never applied for discovery of the addresses of the 136,272 voters. The factual basis on which ground 7.3 of the O 53 statement is based is gone.

A **[50]** It is abundantly clear that the Selangor Government's case now and then was that the impugned 2016 delimitation exercise was unlawful for only one reason, and that is, the electoral roll did not have the addresses of the 137,272 voters.

B **[51]** Now that the missing addresses of the 136,272 voters is no longer relevant and no longer needed for the substantive hearing, we do not think it is permissible for the Selangor Government to blow fire and ice over the issue, in one breadth accepting that the addresses were not necessary for the 2016 delimitation exercise, yet in the next saying that they were needed to carry out C the exercise.

[52] For the same reason, the Selangor Government cannot now be heard to say that the High Court was right in allowing for discovery of the locality code D and locality name of the 136,272 voters, given the fact that the locality code and locality name of the 136,272 voters is tied to the addresses of these voters which, as explained by the Election Commission, were obtained from their identity cards at the point of registration and which were then used to determine their localities.

E **[53]** If, as implicitly admitted by the Selangor Government that the addresses are not necessary for purposes of the judicial review application (and by extension the 2016 delimitation exercise itself), then the fact that the addresses were not on the electoral roll cannot now be used as a ground to say F that the 2016 delimitation exercise was not carried out in accordance with the law.

THE REAL ISSUE IN DISPUTE

G **[54]** It is important to always keep in mind that the real dispute between the Selangor Government and the Election Commission is over the missing addresses of the 136,272 voters. This, we reiterate, is the factual ground on which the Selangor Government sought to quash the Thirteenth Schedule H notice published by the Election Commission, as contained in ground 7.3 of the O 53 statement. None of the other pleaded grounds has the same importance and impact as the issue of the missing addresses.

[55] The missing addresses is the core issue and the whole basis for the I Selangor Government's case against the Election Commission. It must not be blurred by learned counsel's statement from the bar table that what the Selangor Government needs now is only the locality code and locality name of the 136,272 voters that the Election Commission used during the 2003 and 1994 delimitation exercise, and not their addresses.

[56] On the facts and the pleaded case, there can be no argument that the Selangor Government relied entirely on the missing addresses to support prayer 1A(iii), ie for discovery of the locality code and locality name of the 136,272 voters that the Election Commission used for the 2003 and 1994 delimitation exercises.

[57] In the course of the hearing of these appeals and as the argument turned on the locality code and locality name of the 136,272 voters, the learned senior federal counsel Dato' Amarjeet Singh informed the court that the Election Commission does not have the locality code for the 2003 and 1994 delimitation exercises.

[58] This, according to Dato' Amarjeet Singh, was due to the fact that the 1994 electoral roll does not exist today. We were referred to reg 10 of the Elections (Registration of Electors) Regulations 2002 ('the Elections Regulations') which stipulates that the electoral roll must be revised every three months. It is an ongoing process. We reproduce below the provisions of reg 10:

> 10(1) The electoral roll prepared under the Elections (Registration of Electors) Regulations 1971 326/1971], the Elections (Registration of Electors) Regulations (Sarawak) 1971 [P.U. (A) 327/1971] and the Elections (Registration of Electors) (Sabah) 1971 [P.U. (A) 328/1971] and certified by the Election Commission on or before 31 December 2001 become the principal electoral roll under these Regulations.
>
> (2) For the purposes of revision, the Registrar shall, every three months, prepare a list of the names of electors from the principal electoral roll who have died or have become disqualified for registration and the Registrar shall update the principal electoral roll by deleting the names of electors who have died or have become disqualified for registration.

[59] Learned counsel for the Selangor Government took issue with this statement from the bar table by the learned senior federal counsel and insisted that the assertion must be averred to by way of affidavit evidence. We have pondered over the matter and we do not think it is necessary for the Election Commission to affirm an affidavit to confirm what the learned senior federal counsel told the court.

[60] In the first place, the real issue in the judicial review application is the effect in law of the Election Commission's act of using an electoral roll that did not contain the addresses of the 136,272 voters, as pleaded in ground 7.3 of the O 53 statement. The issue concerning the 2003 and 1994 locality code and locality name of the voters was an issue that was raised for the first time in the course of the exchange of affidavits between the parties. It is certainly not the ground on which the Selangor Government's case is based to challenge the legality of the 2016 delimitation exercise.

[61] Secondly, the learned senior federal counsel's explanation on the non-availability of the locality code is reasonable and consistent with what reg 10 of the Elections Regulations stipulates. There is no reasonable ground for believing that there has been a breach of public duty on the part of the Election Commission in failing to keep the locality code. We venture to say that it is unreasonable to expect the Election Commission to keep an electoral roll and locality code that were used for the delimitation exercises carried out decades ago.

The law and legal principles applicable

[62] As for the applicable law on discovery in a judicial review application, O 53 r 6 of the Rules, which empowers the court to grant discovery (and cross-examination) in such application, is couched in the following language:

> After leave has been granted, any party to an application for judicial review may apply to the Judge for discovery and inspection of documents pursuant to Order 24, to administer interrogatories pursuant to Order 26, or to cross examine the deponent of any affidavit filed in support of or in opposition to the application pursuant to Order 38.

[63] Order 24 referred to in O 53 r 6 above, of which rr 12 and 13 are directly relevant, stipulates as follows:

> Order 24
>
> 12 Order for production to Court (O 24, r 12)
>
> (1) At any stage of the proceedings in any cause or matter the Court may, subject to rule 13(1), order any party to produce to the Court any document in his possession, custody or power relating to any matter in question in the cause or matter that falls within one of the following descriptions:
>
> (a) Documents on which the party relies or will rely;
>
> (b) Documents which could —
>
> (i) adversely affect a party's case; or
>
> (ii) support a party's case; and
>
> (c) documents which may lead to a series of enquiry resulting in the obtaining of information which may —
>
> (i) adversely affect a party's case; or
>
> (ii) support a party's case.
>
> (2) The Court may deal with the documents when produced in pursuance of an order made under paragraph (1) in such manner as it thinks fit.
>
> 13 Production to be ordered only if necessary (O 24, r 13)

(1) An order for the production of any documents for inspection or to the Court shall not be made under any of the foregoing rules *unless the Court is of the opinion that the order is necessary either for disposing fairly of the cause or matter or for saving costs.* (Emphasis added.)

[64] The legal principles upon which discovery can be ordered in judicial review proceedings had been explained by this court in *Rekapacific Bhd v Securities Commission & Anor and other appeals* [2005] 2 MLJ 269 where Gopal Sri Ram JCA (as he then was) delivering the judgment of the court noted that the current practice in England after the amendment to their O 53 is set out at pp 254–257 of Richard Gordon's work *Judicial Review and Crown Office Practice,* which he described as the locus classicus on the subject. He then quoted (in extenso) the following observations by the learned author:

Discovery and inspection

Parties seeking discovery and inspection may experience more difficulty than in an ordinary action, notwithstanding the incorporation of O 24 into judicial review proceedings. Whereas in most actions discovery occurs automatically under O 24, rr 1 and 2 *there is no inherent right, in applications for judicial review, to orders for discovery or inspection.*

The retention of control by the court may indicate that such orders will be more difficult to obtain in cases under O 53. Certainly this was the view of the Court of Appeal in *R v Secretary of State for the Home office, ex p Harrison* (unreported, 10 December 1987) where it was stated that an application for judicial review discovery would be appropriate in fewer cases and was likely to be more circumscribed.

In general, the following principles appear to govern the grant or refusal of discovery under O 53:

(a) Discovery will *not be ordered so as to make good defects in the applicant's evidence* (*R v Inland Revenue Commissioners, ex p Taylor* [1988] 1 COD 61; *R v Secretary of State for Education, ex p J* [1993] 1 COD 146; *R v Inland Revenue Commissioners, ex p National Federation of Small Employed and Small Businesses Ltd* [1982] AC 617 at p 635H).

(b) One will seldom obtain full private law type discovery in a *Wednesbury* challenge (*R v Secretary of State for the Environment, ex p Smith* [1988] COD 3).

(c) By contrast, discovery will be ordered under O 53 where it is required so that the justice of the case may be advanced and *where it is necessary for disposing fairly of the matter* (within the meaning of O 24 r 8) (see *R v Inland Revenue Commissioners, ex p J Rothchild Holdings Plc* [1987] 1 DSTC 163; *R v Governor of Pentonville Prison, ex p Herbage (No 2)* [1987] 1 QB 1077).

(d) Discovery will also be ordered to go behind the contents of affidavits if there was some matter before the court which suggested that the contents of the affidavits were not accurate (*Re H, The Guardian*, 17 May 1990). *By*

A *contrast, discovery will not be ordered where there is no reason to doubt the bona fides or accuracy of the reasons given on affidavit* (see *R v Secretary of State for the Environment, ex p Islington LBC* [1992] COD 67; *R v Secretary of State for Health, ex p LB of Hackney* [1994] 1 COD 432).

B The most authoritative pronouncement remains that of Lord Scarman in *Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617 at p 654. In relation to discovery under O 53 he indicated that:

... Upon general principles, discovery should not be ordered unless and until the court is satisfied that the evidence reveals *reasonable grounds for believing that there has been a breach of public duty;* and it should be limited strictly to *documents relevant*
C *to the issue* which emerges from the affidavits.

The second limb of this statement is unexceptionable. It is a guiding rule that discovery and inspection must be restricted to matters relevant to an existing dispute. Indeed, in judicial review proceedings it has been held that discovery must be central to the application (see *R v Secretary of State for the Home Department, ex*
D *p Benson* [1989] COD 329).

It is, however, questionable whether, as a preliminary requirement, the court must attempt an evaluation of merits. Interlocutory relief will be granted only after leave has been given to apply for judicial review. In that sense therefore an applicant seeking discovery has, *ex hypothesi,* an arguable case for asserting a breach of public
E duty.

In *R v Secretary of State for Transport, ex p ABH Road Safety Ltd* [1993] COD 150, Schiemann J left open the possibility that, in an appropriate case, the grant of leave in judicial review may sometimes be taken to establish a prima facie ground of irrationality, thereby justifying an order for discovery. Certainly, following the grant
F of leave, it is difficult to see what else the court can do when considering discovery/inspection beyond determining whether potentially discoverable documents are relevant to the issues between the parties.

Given the two-stage procedure under O 53 it may be that Lord Scarman was merely emphasising the overall hurdles to be surmounted before discovery could become
G available. *Even if these hurdles are surmounted the doctrine of public interest immunity would appear to have more scope, having regard to the nature of the judicial review, as a means of opposing an order for discovery in O 53 proceedings.* (Emphasis added.)

[65] As for the elements required to be shown for the grant of an order for
H discovery, the then Supreme Court in *Yekambaran s/o Marimuthu v Malayawata Steel Bhd* [1993] MLJU 96; [1994] 2 CLJ 581 through Edgar Joseph Jr SCJ had this to say:

The essential elements for an order for discovery are threefold; namely, first there must be a *'document'*, secondly, the document must be *'relevant'* and thirdly, the
I document must be or have been in the *'possession, custody or power'* of the party against whom the order for discovery is sought.

It is indisputable, that the items of which discovery is sought are documents and they are in the possession, custody or power of the defendant and nothing more need be said about this.

As to 'relevance', our Rules of the High Court limit discovery to documents which are 'relevant to' or 'relate' to the factual issues in dispute.

More particularly, the discovery obligation applies to documents 'relating to matters in question in the action' (Rules of the High Court, O 24, r 1(1) or 'relating to any matter in question in the cause or matter' (O 24 r 3(1)). In practice, the relevance is primarily determined by reference to the pleadings but there need not be a pleading for a matter to be said to be in issue (see *Phillips v Phillips* [1879] 40 LT 815 at p 821). (Emphasis added.)

APPLICATION OF THE LAW TO THE FACTS

[66] Juxtaposed with the facts of the present case, how does the law fit in to favour the Selangor Government's prayer for discovery of the locality code and locality name of the 136,272 voters that the Election Commission used for the 2003 and 1994 delimitation exercises?

[67] At the risk of being repetitive, we must first of all reiterate that the main issue before the court is whether the Election Commission acted unlawfully when it carried out the 2016 delimitation exercise (not the 2003 and 1994 exercises) by using an electoral roll that did not have the addresses of the 136,272 voters.

[68] In this regard, it is important to bear in mind that the Selangor Government's pleaded case was never about the non-availability of the locality code and locality name of voters used during the 2003 and 1994 delimitation exercises. It was also never the Selangor Government's pleaded case that the 2016 delimitation exercise was unlawful because the electoral roll did not contain the locality code and locality name of the 136,272 voters used during the 2003 and 1994 delimitation exercises. The Selangor Government's case all along has only been about the missing addresses on the electoral roll that was used during the 2016 delimitation exercise.

[69] The electoral roll with the missing addresses of the 136,272 voters used during the 2016 delimitation exercise is the real dispute between the Selangor Government and the Election Commission, as pleaded in ground 7.3 of the O 53 statement. We must not be sidetracked by side issues. For ease of reference, we reproduce again ground 7.3 of the O 53 statement:

7.3 used the electoral roll which is defective as approximately 136,272 voters in the State of Selangor shown on the electoral roll do not have their corresponding addresses entered on the roll.

[70] Necessity and not fairness is the prime concern of the court in an application for discovery: see *Nguang Chan aka Nguang Chan Liquor Trader & Ors v Hai-O Enterprise Bhd & Ors* [2009] 5 MLJ 40 where this court held as

follows:

> The test is necessity not fairness and it is for the applicant to satisfy the court, see *Dolling-Baker*'s case and *Ventouris v Mountain*. Because of that erroneous premise the learned judge appears to be more concerned with relevance and fairness and omitted to consider whether and why it was necessary for the order to be made.
>
> If necessity is not the prime concern of the court, allowing discovery would tantamount to allowing the respondents to fish for evidence which defeats the purpose of the rule by causing the appellants to suffer unfair disadvantage if they fail to comply with an order which is oppressive and incapable of compliance — see *Taylor v Anderton* and *Leslie S Holmes.*

[71] To entitle the Selangor Government to an order for discovery of the locality code and locality name of the 136,272 voters, it must be shown that there are essentially or fundamentally important questions of fact that are in serious dispute, as decided in *Rekapacific*. This is what Gopal Sri Ram JCA (as he then was) said in this regard:

> The second point that needs to be made — and made quite emphatically — is that it is only in very rare cases that *either cross-examination or discovery or both* should be permitted in judicial review proceedings. This is because questions of fact are rarely in dispute in judicial review proceedings. Of course, *if there are any essential or fundamentally important questions of fact that are in serious dispute* then the judicial review court would be entirely justified in ordering cross-examination to enable it to make the relevant finding of fact. (Emphasis added.)

[72] The question that called for our consideration was whether there is any essentially and fundamentally serious question of fact that is in serious dispute between the Selangor Government and the Election Commission in relation to the 2016 delimitation exercise that warrants discovery of the documents sought for in prayer 1A(iii). From the Selangor Government's perspective and pleaded case, the dispute is over the missing addresses of the 136,272 Selangor voters from the electoral roll.

[73] We must say at the outset that the missing addresses does not even qualify as a dispute, let alone a serious dispute on an essentially and fundamentally important question of fact that warrants discovery of the locality code and locality name of the 136,272 voters that the Election Commission used in carrying out the 2003 and 1994 delimitation exercises.

[74] In the first place, the addresses are not in the Election Commission's possession and the Selangor Government itself has confirmed that it does not need the addresses for the substantive hearing. It is therefore futile to argue that the locality code and locality name of the voters used during the 2003 and 1994 delimitation exercises would provide valuable information that may prove or disprove either party's contentions at the substantive hearing.

[75] Consequently, it was and still is unnecessary for an order of discovery to be made in respect of the locality code and locality name that was used more than 20 years ago. The only issue before the High Court at the substantive hearing would be whether, without the locality code and locality name of the voters used during the 2003 and 1994 delimitation exercises, the 2016 delimitation exercise had been rendered unlawful when Election Commission used an electoral roll that did not have the addresses of the 136,272 voters.

[76] Secondly, the locality code and locality name of the 136,272 voters that the Election Commission used to carry out the 2003 and 1994 delimitation exercises is already out of the Election Commission's possession and it has not been shown that the Election Commission is required by law to keep the locality code and locality name after the 136,272 voters had been assigned their localities at the point of registration.

[77] In *Kerajaan Negeri Kelantan v Petroliam Nasional Bhd and other appeals* [2014] 6 MLJ 31, the Federal Court held that the underlying principle which underscores the discovery process is that it must be predicated on the issues involved in a particular case. In the present case, the application for discovery of the locality code and locality name was clearly not predicated on the issue involved, which is whether the missing addresses had tainted the 2016 delimitation exercise, given that the prayer for discovery of the addresses of the 136,272 voters had been withdrawn.

[78] The law further requires that the documents sought to be discovered must be in the other party's possession before an order for discovery can be issued: *Yekambaran Marimuthu* (see para 65). Since the locality code and locality name for the 2003 and 1994 delimitation exercises is not in the Election Commission's possession, the High Court was in no position in any event to allow prayer 1A(iii), which was to compel the Election Commission to furnish the locality code and locality name for purposes of the substantive judicial review hearing.

[79] To recapitulate, the missing addresses of the 136,272 voters on the electoral roll is a non-issue with the withdrawal of prayer 1A(i), the Election Commission does not have the locality code and locality name used for the 2003 and 1994 delimitation exercises, and the Election Commission has admitted that there are mistakes in the change of localities in some cases.

[80] The question to ask is whether these complaints constitute disputes of fact, and if so whether they can only be resolved by way of discovery of the locality code and locality name used during the 2003 and 1994 delimitation exercises. We do not think so. In our view all these are not disputes of fact, let

alone serious disputes on essentially and fundamentally important questions of fact. Surely, facts that are not in dispute cannot constitute facts in dispute. This is to state the obvious.

[81] There is therefore nothing for the court to resolve by way of discovery as the addresses of the 136,272 voters are not needed, the locality code and locality name of the 136,272 voters used for the 2003 and 1994 delimitation exercises is not in the Election Commission's possession, and mistakes in changing the localities of some of the voters had been admitted by the Election Commission.

[82] Given the factual matrix of the case, all that the High Court needs to resolve at the substantive hearing is purely a question of law, ie whether the application for judicial review ought to be allowed on the ground that the Election Commission acted contrary to law, unconstitutionally, unreasonably and irrationally when it carried out the 2016 delimitation exercise by using an electoral roll that was defective in that it did not contain the addresses of the 136,272 Selangor voters.

THE APPLICATION FOR CROSS-EXAMINATION

[83] As for the application to cross-examine the Chairman of the Election Commission, the principles applicable are the same as those that are applicable in an application for discovery: *Rekapacific*. Cross-examination of deponents of affidavits in judicial review applications are seldom allowed for reasons stated by Lord Diplock in *O'Reily and others v Mackman and others* [1983] 2 AC 237 at p 282:

> ... and to applications for cross-examination of deponents to affidavits Ord 28, r 2(3) applies. This is the rule that deals with evidence in actions begun by originating summons and permits oral cross-examination on affidavit evidence wherever the justice of the case requires. It may well be that for the reasons given by Lord Denning MR in *George v Secretary of State for the Environment* (1979) 77 LGR 689, it will be upon rare occasions that the interest of justice will require that leave be given for cross-examination of deponents on their affidavits in applications for judicial review. This is because of the nature of the issues that normally arise upon judicial review. The facts, except where the claim that a decision was invalid on the ground that the statutory tribunal or public authority that made the decision failed to comply with the procedure prescribed under the legislation under which it was acting or failed to observe the fundamental rules of natural justice or fairness, can seldom be a matter of relevant dispute upon an application for judicial review, since the tribunal or authority's findings of fact, as distinguished from the legal consequences of the facts that they have found, are not open to review by the court in the exercise of its supervisory powers ...

[84] The application to cross-examine must satisfy the three primary

considerations as set out by this court in *Tetuan Kumar Jaspal Quah & Aishah (suing as a firm) v The Co-Operative Central Bank Ltd* [2007] 4 MLJ 638:

> Firstly, the truth of the averment in the affidavit must be challenged or the issues of fact identified. Secondly, cross-examination should only be allowed if the disputed fact is relevant to the issue to be decided and must be limited to that issue only. And thirdly, cross-examination would not advance the cause of justice and should be refused if there is sufficient evidence or contemporaneous documents to enable the court to properly decide without the need for cross-examination.

[85] All three conditions must be satisfied cumulatively and not alternatively: *Tun Dr Mahathir bin Mohamad & Ors v Datuk Seri Mohd Najib bin Tun Hj Abdul Razak* [2016] 11 MLJ 1, per Abu Bakar Jais J. In *Paruvathy a/p Palany v Sathiasealan a/l Govindasamy* [1999] 5 MLJ 151, Abdul Malik Ishak J (as he then was) held as follows:

> Of pertinence to note would be the principle of law gleaned from the case of *Shea v Green* [1886] 2 TLR 533 which states that the court may refuse to act on an affidavit where the deponent cannot be cross-examined. Then there is the principle of law which states that where there is a question of motive or of good faith of a deponent, the court ought not to be asked to act without cross-examination (*Re Smith and Fawcett Ltd* [1942] Ch 304). The court certainly has a discretion to allow a party to cross-examine a deponent. Chan Sek Keong J in *Tang Choon Keng Realty (Pte) Ltd & Ors v Tang Wee Cheng* [1992] 2 SLR 1114 succinctly said at p 1142 of the report that in an action tried on affidavits a party who has sworn an affidavit may be subject to being cross-examined on it.

[86] Allegations of bad faith on the part of the decision maker may also have to be investigated by cross-examination: see *Judicial Remedies in Public Law* (5th Ed) by Clive Lewis at p 363.

[87] The Selangor Government's complaint against the Election Commission was over the destruction of the addresses and voter registration documentation of the 136,272 voters. It was submitted that it was improper for the Election Commission to have done so.

[88] It was pointed out that there is a grave inconsistency in the Election Commission's averment that the documents had been destroyed, as the following would show:

(a) the Election Commission's *Sistem Semakan Isi Rumah* itself clearly suggests that voters can check their addresses online and even apply to change their addresses if there is any error. Learned counsel questioned how this would be possible if the Election Commission now states that it had destroyed the addresses of all voters who registered prior to 2002 before the migration to the computer system, which includes the 136,272 voters;

(b) the *Sistem Semakan Isi Rumah* to date contains the addresses of voters registered before the migration to the computer system in 2002;

(c) the Election Commission previously averred that it does possess at least some of the addresses of voters registered before the migration to the computer system in 2002. It was pointed out that the Election Commission appears to have adopted a completely different position now by making a blanket statement that all the addresses pre-2002 had been destroyed; and

(d) the Election Commission itself averred that '... sebelum seseorang itu boleh didaftarkan sebagai pemilih, ia akan melalui proses ketat dengan mempamerkan nama-nama dan alamat yang diberikan oleh pemilih-pemilih tersebut sendiri untuk maksud bantahan oleh pihak-pihak berkenaan'. According to learned counsel, it would be very unusual if the Election Commission does not possess documentation of a process that it deems so stringent.

[89] Reference was made to the following passages in *R (on the application of Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1409:

> 50. Mr Parker submits, correctly, that there is no duty of general disclosure in judicial review proceedings. However there is — of course — a very high duty on public authority respondents, not least central government, to assist the court with full and accurate explanations of all the facts relevant to the issue the court must decide. The real question here is whether in the evidence put forward on his behalf the Secretary of State has given a true and comprehensive account of the way the relevant decisions in the case were arrived at. If the court has not been given a true and comprehensive account, but has had to tease the truth out of late discovery, *it may be appropriate to draw inferences against the Secretary of State upon points which remain obscure:* see *Padfield* [1968] AC 997, per Lord UpJohn at 1061G–1062A. (Emphasis added.)

[90] It was argued that the Election Commission must keep all the historical records or addresses of the voters and that it was incumbent on them to retain copies of the addresses. It was alleged that the Election Commission was not forthcoming on this vital information.

[91] It was further contended that if the Election Commission fails to answer these questions, then this would provide the basis for the Selangor Government's application to cross-examine the Chairman of the Election Commission in connection with the destruction of the documents.

[92] Learned counsel went on to submit that from the evidence filed, it is clear that there are several disputes of fact warranting resolution by cross-examination of the Election Commission Chairman. Such disputes of fact include:

(a) why, when and how did the Election Commission destroy information as important as the addresses of at least 136,272 voters in the State of Selangor and whether they nonetheless maintained in other formats and where it is stored; and

(b) whether the localities of voters have been arbitrarily changed by the Election Commission without any change of addresses or application being made by the voters themselves, and the extent of such discrepancy.

[93] It was submitted that these issues revolve around the question whether the Election Commission had conducted itself in good faith or had acted mala fide in the exercise of its power, which is a strong consideration for allowing cross-examination in a judicial review.

[94] What is clear from the argument is that the application to cross-examine the Election Commission Chairman is grounded on the missing addresses of the 136,272 voters, the same ground that it relied on in applying for discovery of the locality code and locality name of the voters. We have said enough on the address issue when dealing with the application for discovery and we do not propose to repeat them, save to say that having regard to the principles applicable, the learned judge was right in disallowing the prayer for cross-examination.

THE EXERCISE OF DISCRETION

[95] In deciding the way we did, we were mindful of the fact that these appeals concern the exercise of a discretion by the learned judge. It was urged upon us by learned counsel not to disturb the High Court's decision as it is trite law that an appellate court would be slow to interfere with the discretion of the judge of first instance, especially with regard to interlocutory matters. Reliance was placed on *ECM Libra Investment Bank Bhd v Foo Ai Meng & Ors* [2013] 3 MLJ 35 where this court held:

> (a) it is well settled that the appellate court will not ordinarily interfere with the exercise of discretion of a trial court in relation to procedural and/or interlocutory matters (see *Davy v Garrett* (1878) 7 Ch D 473);
>
> (b) the appeal relates to an interlocutory procedural order and exercise of discretion. It is well settled that in an appeal against the exercise of discretion by a judge, the initial function of the appellate court is one of review only, there being no original discretion vested in the appellate court. It is for the appellant to demonstrate that an error in the exercise of discretion has indeed occurred and it is also one of the

A categories of cases where appellate interference is warranted (see *Wah Bee Construction Engineering v Pembenaan Fungsi Baik Sdn Bhd* [1996] 3 CLJ 858; *Majlis Peguam Malaysia & Ors v Raja Segaran a/l S Krishnan* [2002] 3 MLJ 155);

B **[96]** The correct approach to be adopted by an appellate court in dealing with the exercise of such discretion has been explained by Lord Guest delivering the judgment of the Privy Council in *Ratnam v Cumarasamy & Anor* [1965] 1 MLJ 228; [1964] 1 LNS 237, a decision on appeal from Malaysia, in the following terms at p 229:

C > The principles upon which a court will act in reviewing the discretion exercised by a lower court are well settled. There is a presumption that the judge has rightly exercised his discretion (*Charles Osenton & Co v Johnston* per Lord Wright at p 148). The court will not interfere unless it is clearly satisfied that the discretion has been exercised on a wrong principle and should have been exercised in a contrary way or that there has been a miscarriage of justice (*Evans v Bartlam*).

D **[97]** There are, therefore, two situations where the exercise of the discretion can be assailed on appeal:

E (a) where the discretion has been exercised on a wrong principle and should have been exercised in a contrary way; or

(b) where there has been a miscarriage of justice occasioned by the exercise of the discretion.

F **[98]** Other than these two situations, the exercise of the discretion must not ordinarily be disturbed on appeal as the presumption is that the judge has rightly exercised his discretion. For reasons that we have given, and with due respect to the learned judge, we were of the view that he had acted on a wrong principle in allowing the Selangor Government's application for discovery of the locality code and locality name that was used for the 2003 and 1994 delimitation exercises.

G CONCLUSION

H **[99]** It was for all these reasons that we allowed the appeal by the Election Commission and dismissed the appeal by the Selangor Government.

Order accordingly.

I Reported by Afiq Mohamad Noor